United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

274

No. 17,183

BENJAMIN E. WHITE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

[Filed Sept. 20, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA)	Criminal No. 860-61
)	
vs.)	Grand Jury No. 1114-61
)	
BENJAMIN E. WHITE)	Housebreaking and Larceny (22-1801, 2201, 2202, D.C. Code)

IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

COMPLAINT

Affidavit No. _____

WHEREAS Franklin Simmons hath upon oath before me Robert E. Gaskins, a Deputy Clerk of The Municipal Court for the District of Columbia, made complaint and declared that on the 1st day of September, A. D. 1961, at the District aforesaid, one Benjamin Ernest White, one Marvin Jerome Williams, and one James Yates did then and there feloniously steal, take and carry away 4500 Wisc. Ave., N. W. of Sears, Roebuck & Co., a body corporate 1 19" Silvertone portable TV set of the value of One Hundred Seventy-eight dollars all lawful money of the United States, of goods and chattels of Sears, Roebuck & Co., a body corporate against the form of the statute in such case made and provided, and against the peace and government of the United States of America.

Witness, The Honorable JOHN LEWIS SMITH, JR., Chief Judge of The Municipal Court for the District of Columbia, and the seal of said Court this 4th day of Sept., A.D. 1961.

WALTER F. BRAMHALL
Clerk, The Municipal Court, D.C.
By /s/ Robert E. Gaskins

[Reverse side of Complaint]

Judge Scalley Precinct No. US 6269-61

UNITED STATES)
)
vs.)
)
1. Benjamin Ernest White)
1108 Trinidad Ave., N. E.)
)
2. Marvin Jerome Williams)
1832 Providence St., N.E.)
)
3. James Yates)
106 V st., N. E.)

COMPLAINT - Grand Larceny

Cepi. /s/ M. M. Burton

WITNESSES: [Each Deft.]

Franklin Simmons, 3604-13th St., N. W.

Det. Walter A. Phillips #8 Pct.

Fred Brunson, 1502 Ninth St., N. W.

Det. Howard R. Holden #8

Sept. 19, 1961 [Each Deft.] Hearing held Hearing waived

Held to await the action of the Grand Jury Committed to Jail in default of recognizance in the sum of #1 - 1000, #2 - 2000, #3 - 3000, to appear in The United States District Court for the District of Columbia.

[1 - 2- 3 Committed] /s/ Scalley Released on bond_____, 19____

_____ Surety

Sept. 4, 1961 [File stamp of Mun. Court]

Defendant informed of:

1. Within Complaint
2. Right to retain Counsel
3. Right to preliminary Examination
4. Defendant is not required to make statement
5. Any statement made by Defendant may be used against him.

C 9/19/61

Bond # 1 - 1000^{00} #2 - 2000^{00} #3 - 3000^{00}

1-2-3
Committed

_____

[Filed Oct. 16, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on August 31, 1961, Sworn in on September 5, 1961

THE UNITED STATES OF AMERICA	)	Criminal No. 860-61
vs.	)	Grand Jury No. 1114-61
Benjamin E. White	)	Housebreaking and Larceny (22-1801, 2201, 2202, D.C. Code)

The Grand Jury charges:

On or about September 1, 1961, within the District of Columbia, Benjamin E. White entered the store of Sears, Roebuck and Co., a body corporate, with intent to steal property of another.

SECOND COUNT:

On or about September 1, 1961, within the District of Columbia, Benjamin E. White stole the property of Sears, Roebuck and Co., a body corporate, of the value of about $110.00 consisting of the following: one television set of the value of $110.00

/s/ David C. Acheson
Attorney of the United States in and
for the District of Columbia.

A TRUE BILL:

/s/ Clifford S. Hynning
Foreman

[Filed Oct. 20, 1961]

PLEA OF DEFENDANT

On this 20th day of October, 1961, the defendant Benjamin E. White, appearing in proper person and the defendant states he will retain counsel, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District of Columbia Jail.

By direction of

Matthew F. McGuire
Presiding Judge
Criminal Court # Assign.

* * *

[Filed July 25, 1962]

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS

1 Washington, D. C.
Tuesday, February 13, 1962

The above-entitled matter came on for trial before The Honorable EDWARD A. TAMM, Judge, United States District Court for the District of Columbia, and a jury at 11:50 a.m.

* * * * *

7 FRANKLIN SIMMONS

* * * * *

DIRECT EXAMINATION

BY MR. MURPHY:

Q. Would you please state your name and address, sir? A. Franklin Simmons, 3604 Thirteenth Street, Northwest.

Q. Are you employed, Mr. Simmons? A. Yes, I am.

Q. Where abouts is that? A. Sears Roebuck, 4500 Wisconsin Avenue.

Q. How long have you been employed by the Sears Company? A. Approximately two years.

* * * * *

8 Q. Were you assigned to any particular division or just to the general stock room itself? A. To the general stock room.

Q. Now, how many doors are there on the stock room? A. There is only two main doors leading into the stock room.

Q. Now, on the outside of the doors, are there any signs? A. They have signs stating "For Employees Only".

Q. Now, was that sign there on the first of September of last year? A. Yes, sir, it was.

9 Q. Directing your attention to about 1:00 p.m. on September 1st of last year, were you in the stock room at that time? A. Yes, I was.

Q. Did anything unusual occur at that time? A. Well, this Benjamin White came into the stock room. I was down near the T.V. department. He came in and spoke to me and said, "Hi", and I said, "How're you doing?" He went right over to the place where the T.V.'s were, picked up the T. V. -- picked up this particular T.V., turned and walked out of the stock room.

Q. Is the person that you have just described in the courtroom today and, if you see him, will you please point to him? A. Him right there (indicating).

MR. MURPHY: I would like the record to indicate, Your Honor, that the witness pointed to the defendant.

THE COURT: The record will so indicate.

* * * * *

BY MR. MURPHY:

10 Q. Just what you did, Mr. Simmons. A. Well, after he turned and went out of the stock room, I went and started following him. I wasn't exactly sure that he was a porter and after he was out of the stock room --

MR. DAVID: Objection.

THE COURT: Are you addressing the Court, Mr. David?

MR. DAVID: Yes, Your Honor. I'm sorry.

THE COURT: Just say what you did; don't say what you saw.

THE WITNESS: I went out of the stock room. I didn't see him out on the floor anywhere, so I went on out to the T. V. department and I didn't see him out there. So I notified the head stock man and he, in turn, notified security.

* * * * *

12 BY MR. MURPHY:

Q. Mr. Simmons, directing your attention to the following day, that is September 2nd of last year, were you on duty at the Sears store on that day? A. Yes, I was.

Q. Did there come a time in which you saw the defendant in this case, Mr. White, and if so, would you relate the circumstances?

A. On the second day, I was told that the same --

THE COURT: No. Just answer the question.

BY MR. MURPHY:

Q. Not what anyone told you. Did you see Mr. White on the following day and, if so, where? A. Yes, sir, I did.

Q. Where abouts was that? A. On the basement floor, headed back towards the stock room.

13 Q. How was he attired on that occasion? A. He had on the same uniform.

Q. What, if anything, did you do at that time? A. Well, I along with two of the other stock men, we started walking towards him. When he saw us, he turned and started walking pretty fast up the steps and he got on the escalator and went up on to the second floor where he was apprehended.

Q. All right, sir. Did you subsequently identify him as the man you had seen the day before? A. Yes, sir, I did.

Q. Directing your attention to the television set, can you describe how it was packaged? A. It's in a sealed carton.

Q. Can you describe the size of that carton? A. I would say it's around a foot and a half high to, say, maybe three foot long.

Q. If you saw an object that was similar to if not the television in question, would you be able to recognize that as the one or the type of television which you saw on the 1st at the time the defendant came in and removed it? A. Yes, I would be able to.

* * * * *

14 MR. MURPHY: May it please the Court, may the carton be marked Government's Exhibit No. 2 for identification and the set Government's Exhibit No. 3, for identification?

THE COURT: The exhibits will be so marked.

THE DEPUTY CLERK: Government's Exhibits No. 2 and No. 3, for identification.

(Carton and T. V. Set marked Government's Exhibits No. 2 and No. 3 respectively, for identification.)

* * * * *

BY MR. MURPHY:

Q. Mr. Simmons, I direct your attention to what has been marked
15 Government's Exhibit No. 2 for identification. Do you recognize Government's Exhibit No. 2 for identification, that is, this carton?
A. Yes.

Q. What do you recognize it as? A. It looks exactly like the set that was taken.

Q. Now, is that the type of television that is handled by you in the stock room? A. That is right.

Q. Now, I direct your attention to Government's Exhibit No. 2 for identification, in particular this end of the box, and ask you whether it bears a green tag? A. Bears a green tag?

Q. Yes. Does it have a green tag? A. Yes, a transfer tag.

Q. Does that tag bear an address, sir? A. Yes, sir; 4500 Wisconsin Avenue.

Q. What is the address of 4500 Wisconsin Avenue? A. That is the address of Sears Roebuck.

Q. Now, I direct your attention to what has been marked Government's Exhibit No. 3 for identification: Have you ever seen an item similar to Government's Exhibit No. 3, for identification?
16 A. I have.

Q. What is Government's Exhibit 3 for identification? A. That is a portable T. V.

Q. Is that the type of television set that is sold in the Sears Roebuck store on Wisconsin Avenue. A. That is right.

Q. Was that the type of television set that was handled in your stock room on September 1st of last year? A. Yes, sir.

* * * * *

CROSS EXAMINATION

BY MR. DAVID:

* * * * *

21 Q. What kind of set did he pick up? A. A portable T. V.

Q. What make of T.V. set? A. Approximately the same number, 1124.

Q. Did you say "approximately"? A. Well, I couldn't be positive that it was the exact set because they all are in the same type box.

Q. Does Sears sell a varied selection of T. V.'s, different makes? A. They do.

Q. They do. So, he might have had, according to you, any type of set; isn't that so? A. No, it was a regular portable of that size.

Q. What do you mean by "regular portable"? A. It was a portable that came in that particular size.

Q. What make portables come in that size? A. We usually go by the stock number, which is 1124.

22 Q. What make T.V.'s come in boxes that size? A. Well, I couldn't --

Q. Does Sears sell Philco?

THE COURT: Just a minute. You have two questions pending, Mr. David.

MR. DAVID: I thought he had answered it, Your Honor.

THE COURT: Read the pending question to the witness, Madam Reporter.

(The pending question was read by the reporter, as follows: "What make T.V.'s come in boxes that size?"

THE WITNESS: I couldn't give you the make because we only go by stock numbers. I couldn't say it was a 1960 or '61 or anything like that.

BY MR. DAVID:

Q. Does Sears Roebuck sell Philco televisions? A. They only sell Silvertone.

Q. That is the only make they sell? A. Yes, sir.

* * * * *

25 FRED BRUNSON

* * * * *

DIRECT EXAMINATION

BY MR. MURPHY:

* * * * *

26 Q. Directing your attention to September 1st of last year, what was your job at that time? A. The 1st of September?

Q. Yes, of last year. A I was in charge of the basement stock room.

* * * * *

28 Q. Now, in the stock room, do you handle television sets?

A. Yes.

Q. Whatmake television sets do you customarily handle?

A. We customarily handle Silvertone.

Q. Do you have many models of television sets? A. Yes, we have quite a few models.

29 Q. How are they stored, broken down by models or how? Explain that to His Honor and the jury. A. We stock them by numbers. However, some come in 1124, some 2106, some 2104 and what not.

Q. You are referring to model numbers? A. That is correct.

Q. I direct your attention, sir, to what has been marked Government's Exhibit 2, for identification, this carton and ask you if you recognize this carton or a carton similar to it? A. Yes, I do.

Q. What do you recognize it as? A. First by the number.

Q. What number are you referring to? A. The stock number.

Q. Would you read that for purposes of the record, sir?

A. 1124.

Q. And what,sir, is the significance of that number? A. That is the direct number of the set.

Q. You are referring to model? A. Referring to model, that is correct.

Q. Now, I direct your attention to what has been marked Government's Exhibit No. 3 for identification, and ask you if you can recognize

or can identify this exhibit? If you feel you want to come closer, I would ask the Court's permission to have you come over here.

30 A. I can recognize it right here, sir.

Q. What do you recognize it as, sir? A. First of all, the set is No. 1124 and that set there is small and in the back of it, it would have a little blue label on the back for service calls; and then on the back of it, it will have also the serial number but that is different from the number that is on the box.

Q. The box number is the model number and not the serial number, is that right? A. That is correct.

Q. Is this similar to the type of merchandise that was stored in your stock room on the 1st of September of last year? A. Yes, sir; that is correct.

* * * * *

Q. Did there come a time in which you received any information from an employee, Franklin Simmons, concerning an incident that had occurred in the stock room? A. I was out at the time but when I came back, I heard it.

Q. He gave you certain information? A. That is correct.

31 Q. Did you conduct an inventory of the premises to determine if anything was missing? A. Yes, we did.

Q. What did you discover was missing? A. One portable T.V. set.

Q. What model number did that have, if any? A. What model number?

Q. Yes. A. At that time, it was 1124.

* * * * *

36 JOSEPH GILENO

called as a witness on behalf of the Government, having been first duly sworn, took the witness stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MURPHY:

* * * * *

37 Q. Where are you employed? A. Sears Roebuck & Company at 4500 Wisconsin Avenue, Washington.

Q. How long have you been employed by the Sears Roebuck company? A. Sixteen years.

* * * * *

Q. What was the general nature of your duties, sir, on September 1st of last year? A. I was, as I am now, merchandise control officer.

Q. What does that mean? A. Well, it is my job primarily to control inventories and to control the buying of units in different

38 departments.

Q. Does the course of your work include handling records that reflect the wholesale cost and the retail sales price of various items of merchandise? A. Yes, it does.

* * * * *

Q. Directing your attention to that date, did you have for sale a model No. 1124? A. Yes, sir.

Q. What type of television is that? A. It is a portable, 19-inch television set.

Q. I direct your attention, sir, to what has been marked Government's Exhibit No. 3, for identification, and ask you if you recognize this object? A. Yes, I do.

Q. What do you recognize it as? A. Well, as a matter of fact,

39 it is one -- a model exactly as I own myself, an 1124.

Q. Directing your attention to the first of September of last year, was that type of model sold in your store? A. Yes, it was.

Q. What was the retail sales price of that model? A. The price was $178.00.

Q. What was the wholesale value, the cost to Sears Roebuck?
A. The cost to us is $111.24.

Q. Do you know of your own knowledge if any of that model were sold during the period around September 1st of last year?
A. My personal knowledge, no.

* * * * *

40 Q. I see. Well, directing your attention to September 2nd of last year, were you on duty in the store? A. Yes, I was.

Q. Did there come an unusual occurrence -- did something unusual occur on that day? A. Yes, sir.

* * * * *

Q. Not what they said. Pursuant to any information they gave to you, what did you personally do? Not what others told you, sir.
A. Well, I walked up to this particular person and I said, "We would like to talk to you in the office for a little bit."

Q. Was there anything unusual about his attire, the dress of the person that you approached? A. Yes, there was.

Q. What was that? A. Although he had a gray shirt on with a Sears Roebuck emblem over his pocket on the left, he was wearing green trousers which were not part of the authorized stock uniform.

41 Q. Then what if anything occurred? A. He was escorted back to the security office.

Q. Did there come a time in which Mr. Simmons appeared on the scene? A. Yes, he was called.

Q. Do you know Mr. Simmons? A. Yes, I do.

Q. What occurred when Mr. Simmons appeared? A. He identified the man as being the one who he saw in the stock room the day before.

* * * * *

51 MARTIN LEIGHT

called as a witness on behalf of the Government, having been first duly sworn, took the witness stand, was examined and testified as follows:

52 DIRECT EXAMINATION

BY MR. MURPHY:

* * * * *

Q. Directing your attention to September 1st of last year, were you employed by Sears Roebuck? A. Yes, sir.

Q. In what location, sir? A. 4500 Wisconsin Avenue.

Q. In what capacity? A. Security officer.

53 Q. Are you commissioned a special police officer within the District of Columbia? A. Yes, sir.

* * * * *

Q. Did you commence an investigation based upon the complaint you received from Mr. Simmons? A. Yes, I did.

Q. Did there come a time when you sought to determine whether any property belonging to Sears Roebuck was missing? A. Yes, sir.

Q. Did you determine an item to be missing? A. Yes, sir.

Q. What was that item, sir? A. It was a table model T. V.

* * * * *

55 Q. What, if anything, occurred upon your arrival to the first floor? A. When I arrived on the first floor, I happened to view Mr. White walking down the main isle and I stopped him and asked him where he got the shirt.

Q. The person you stopped who was walking down the isle, can you describe how he was attired, sir? A. He had on green pants and

56 a Sears Roebuck shirt.

Q. Then, what, if anything, did you do? A. I asked him where he had gotten the shirt and he said he found it. Then I asked him if he wouldn't mind coming to the security room with me.

Q. Did there come a time in which you sought to determine whether the individual you had with you was an employee of the store?

A. Yes, sir. After I had taken him to the security room, I notified Mr. Simmons, the stock employee, to come up.

Q. Did Mr. Simmons come up? A. Yes, he came up and he definitely identified the man as the man who took the T.V. set the day before.

* * * * *

Q. Do you see that person in the courtroom today? If you do, will you please point him out. A. Yes, that one (indicating).

MR. MURPHY: May the record show the witness has pointed to the defendant, Your Honor?

THE COURT: The record will so indicate.

57 BY MR. MURPHY:

Q. What, if anything, occurred after the defendant was taken to the security office? A. After Mr. Simmons had identified him definitely, I in turn notified No. 8 and asked Detective Phillips and Detective Boyd to come over.

Q. And did there come a time in which the police officers came? A. Yes, sir.

Q. Did there come a time in which the defendant was removed from the scene of the Sears Roebuck store? A. Yes, sir.

* * * * *

CROSS EXAMINATION

BY MR. DAVID:

Q. Mr. Leight, I believe you testified heretofore on direct exam-

58 ination that you determined a certain item was missing from the stock room; is that correct? A. That is right.

Q. How did you so determine? A. There were six of the same sets in the stock room and one was gone.

Q. You checked the store's records to see whether such an item had been sold? A. No, sir, it wasn't sold.

Q. I asked you whether you had checked the store's records? A. No, sir.

* * * * *

64 WALTER A. PHILLIPS

* * * * *

DIRECT EXAMINATION

BY MR. MURPHY:

Q. Sir, would you please state your name and your assignment?

A. Walter A. Phillips, Detective, No. 8 Precinct.

* * * * *

Q. Sir, addressing your attention to September 2nd of last year, were you assigned to the 8th Precinct? A. Yes, sir.

Q. Where is the station house of the 8th Precinct located?

A. At 4125 Albermarle Street, right at Albermarle and Wisconsin.

* * * * *

65 Q. How far is the Sears Roebuck store from the precinct?

A. It is right next door from the precinct.

Q. Directing your attention to September 2 of last year approximately noon or shortly thereafter, were you on duty? A. Yes, sir.

Q. Where were you at that time? A. I was cruising in a police cruiser.

Q. Did there come a time in which you received a run to the Sears Roebuck store on Wisconsin Avenue? A. Yes, sir.

Q. Did you respond to that address? A. Yes, sir, I did.

Q. Where, sir, did you go after you responded to the store?

A. To the security office.

Q. Who, sir, if anyone, did you find in the security office upon your arrival? A. Mr. Leight, the security officer, the defendant, a gentleman by the name of Franklin Simmons.

* * * * *

66 Q. How was the person you described as the defendant attired on the occasion when you arrived at the security office? A. He was dressed in a gray shirt with a Sears label over the pocket and green pants.

Q. If I showed you a shirt which resembles the shirt he had on, would you be able to recognize it? A. Yes, sir.

Q. I show you what has been marked Government's Exhibit No. 1 for identification, and ask you if you can recognize it? A. Yes, sir. Yes, it was a shirt in that style.

* * * * *

67 Q. * * *

Upon your arrival at the security room, did there come a time in which you received certain information from Mr. Leight and Mr. Simmons? A. Yes, sir.

Q. And what did you do pursuant to the information that you had received? A. The defendant was taken to No. 8 Precinct on the information we had received at that time.

Q. Do you know, sir, what time it was that you arrived at the security office? A. About 12:45 -- 12:50.

Q. Now, what time was it that the defendant arrived at the precinct? A. About 1 o'clock.

Q. And did there come a time in which the defendant was taken to a detective's room in the precinct? A. Yes, there was.

Q. Where is that room located? A. On the second floor in the 8th Precinct.

Q. Who, if anyone, was with the defendant at the time?

68 A. I was there, Detective Holden was there, the defendant and that was all that was up there in the office.

Q. What was the purpose of your taking the defendant to the second floor? A. The defendant was identified as the man who was in the store the previous day and had taken a television set, which we had a report on.

Q. What was the purpose of taking the defendant to the second floor at the particular time you took him upstairs? A. To question him in regard to the larceny of the television.

Q. Had the defendant been booked at that time? A. Yes.

Q. What does the term "booked" mean? A. When he was taken to the precinct, we have an arrest book and his name and all information

is placed on the book and the charge is placed on the book, and the arresting officer's name.

Q. What was the charge in this particular case? A. Grand larceny.

Q. What did you do after you arrived upstairs with the defendant? A. I questioned the defendant about the larceny of the television set the previous day and also that he was identified --

69 * * * * *

A. I was questioning him about the larceny.

Q. Were you preparing papers or forms? A. Yes, sir. We were getting ready to prepare a lineup sheet.

Q. How long was this after you had removed the defendant from the Sears Roebuck store? A. Fifteen minutes.

Q. Now, did the defendant make certain statements to you relevant to the television set? A. Yes, he did.

Q. And did you threaten him in any way prior to the time he made these statements? A. No, sir.

Q. Did you offer him any inducement of any sort? A. No, sir.

Q. The statements that he made, of whatever nature they may have been, in your opinion were they made voluntarily and given freely by this defendant? A. Yes, sir, they were.

Q. Would you relate the conversation that you had with the defendant at this time?

70 MR. DAVID: If it please the Court, may we approach the Bench before he goes into that?

THE COURT: You may.

(At the Bench:)

MR. DAVID: At this time, I would move to suppress any statement that the police officer might have taken from the defendant.

THE COURT: On what ground?

MR. DAVID: On the ground it was taken under duress and not voluntarily made.

THE COURT: Do you have evidence to substantiate your contention?

MR. DAVID: The evidence, if it please the Court, is the man was under arrest. He was taken to this particular room, I am certain, against his will. He had been detained by private persons until the police officers were called, then he was taken to the precinct where the statement is alleged to have been made.

THE COURT: I can't pass on your motion until I hear the testimony. I will excuse the jury and hear your testimony on this point.

(In Open Court:)

* * * * *

71 (Whereupon the jury retired from the courtroom at 3:20 p.m., and the following proceedings ensued:)

DIRECT EXAMINATION

BY MR. MURPHY:

Q. Detective Phillips, will you relate the conversation that transpired between you and the defendant at the time you questioned him?

A. When we got upstairs in the room, I asked the defendant if he was the one that had taken the television set on the 1st. The defendant denied it.

I also told the defendant that he was identified by a man in the stock room; that he had the same clothes on on the 2nd that he had on the 1st and I didn't think the man in the stock room would just pick him out as the person who took the television set.

After a while the defendant admitted taking the television set.

Q. How long is a while? A. About a half hour from the time he was arrested and booked.

72 Q. What were you doing during this half-hour period? A. Preparing notes and getting ready to make the lineup sheet.

Q. You say he admitted it. Can you remember the exact terminology that he used? A. He said that he had taken the television set. I had asked him where the set was.

Q. And did you question him about why he had the shirt on or

where he got the shirt? A. He had said he had gotten the shirt at the Goodwill Mission.

Q. I see. Did you ask him any further questions about the set as to where it might be located? A. Yes, I did.

A. What information did you receive in that regard? A. He stated the set might be found in the rear of 1909 Benning Road, Northeast.

Q. Officer, during the period of time that you were questioning him, were you preparing any statements or records or other paraphernalia with regard to regular booking procedures of the defendant? A. Just the lineup sheet at that time.

* * * * *

73 CROSS EXAMINATION

BY MR. DAVID:

* * * * *

74 Q. Now, Officer Phillips, will you tell me again why you arrested this man and took him to the precinct? A. Well, most of the time we are out in the cruiser and when we see a call of the nature that they are holding them, we respond to calls in the stores in the precinct. He was taken to the station and booked. I received the additional assignment on the 1st of September of the larceny at the Sears Roebuck store,

75 and that is why I entered the case.

Q. I want to know why you arrested the man. A The man was detained and arrested by the special officer at the Sears Roebuck store, Mr. Leight, and he was taken --

Q. You continued further that detention and arrest, did you not? A. Yes, sir.

Q. Why? A. Because the man fit the description and was identified as the man who had taken the television set from Sears Roebuck on September 1st.

Q. Now, on direct examination, the District Attorney asked you to repeat the exact terminology. I suppose he meant by that for you to

use the exact words that the defendant used when you were questioning him about having stolen the T. V.

Will you tell the Court, please, what did the defendant say in answer to your question. A. Sir, I couldn't tell you the exact words except that he admitted to me that he took the television set.

Q. Weren't you preparing a statement at that time? A. Yes, sir, I was and all I put on the statement was that the defendant admitted this case.

* * * * *

78 HOWARD R. HOLDEN

* * * * *

DIRECT EXAMINATION

BY MR. MURPHY:

Q. Sir, would you please state your name and assignment?

A. Detective Howard R. Holden, attached to No. 8 Precinct.

Q. Were you so attached or assigned September 2nd of last year?

A. Yes, I was.

Q. Directing your attention to the period of time approximately 1:00 p.m. on that date, where were you? A. I was in the vicinity of the 8th Precinct.

Q. Did there come a time in which you saw the defendant in this case, Mr. White? A. Yes, sir.

Q. Where abouts was that? A. That was at the subsequent arrest of him in Sears Roebuck.

Q. Did there come a time in which you accompanied the defendant or went to the precinct and saw the defendant there? A. Yes.

79 Q. Approximately what time was that? A. Approximately 30 minutes later.

Q. All right. Can you pick a time? A. Approximately 2:00 p.m.

Q. Did there come a time in which the defendant was taken to the second floor and questioned by yourself and Detective Phillips?

A. Yes, sir. At that time, we made out the necessary papers for his transportation to Headquarters for fingerprinting and lineup.

Q. At the time he was being questioned, was there anyone else in the detective room? A. Detective Phillips and I.

* * * * *

Q. Did there come a time in which a conversation was held with the defendant? A. Yes.

80 Q. Do you know what -- Had the defendant been booked at that time? A. To the best of my knowledge, he had been booked.

Q. What was he charged with? A. He was charged with larceny at that time.

Q. Who was the complainant on the larceny charge? A. I believe Mr. Simmons, who is the stock boy at the store.

Q. Did there come a time that the defendant was questioned relative to the complaint of Mr. Simmons of Sears Roebuck? A. Yes, he was questioned.

Q. Did he make certain statements concerning the charge of Mr. Simmons of Sears Roebuck? A. Yes. At that time --

Q. My question is did he make certain statements? A. Yes.

Q. Was he threatened in any way prior to the time he made the statements? A. No, sir.

Q. Was he offered any promises or inducements? A. No, sir.

Q. In your opinion, were the statements made, if any, were they made of his own free will? A. I presume they were.

81 Q. Do you have anything to indicate to the contrary? A. No.

Q. What, if anything, did the defendant say relating to the present case? A. During the subsequent making out of the papers for the lineup sheet, he was asked did he admit this case, and he said yes.

Q. Do you remember any specific questions and answers? A. I think we went over the general case itself and the method of operation, and we asked him if he had taken the T. V. set and he said he had.

Q. Did he ever deny it during the period of time that you questioned him? A. No, not to my knowledge.

Q. I see. Did there come a time in which he gave you certain

information relevant to where the television set might be? A. Yes.

* * * * *

CROSS EXAMINATION

BY MR. DAVID:

* * * * *

83 Q. The District Attorney asked you what was the charge. Will you repeat again with what this man was charged? A. At the subsequent booking, he was charged with larceny.

Q. Was he charged with anything else? A. At the first booking, no; later, it was changed to housebreaking at the Grand Jury and grand larceny, and also there was a narcotics charge which was entered in at the time of the subsequent booking.

Now, I didn't go into that before because actually he is not on trial for that charge; but you asked me the definite question, so now I am telling you.

* * * * *

84 BY MR. DAVID:

Q. Detective Holden, I believe you stated heretofore and I quote, "I presume they were voluntary", meaning his words. A. Well, they were his own words, his own statements so I take it for granted they were voluntary.

Q. But the man was under arrest, isn't that so? A. He was under arrest.

Q. He could not have gotten up from that place where you had him and walked out, could he? A. That is right.

* * * * *

85 THE COURT: I think the Court must deny the motion to suppress.

(Whereupon, at 3:40 p.m., the jury returned to the courtroom and the proceedings in progress resumed:)

Whereupon,

WALTER A. PHILLIPS

the witness on the stand prior to exclusion of the jury, resumed the witness stand, was examined and testified further as follows:

86 DIRECT EXAMINATION (Resumed)

BY MR. MURPHY:

Q. Detective Phillips, directing your attention to the period of time in which you were questioning the defendant on September 2nd of last year in the 8th Precinct here within the District of Columbia, you stated that you had a conversation with the defendant relevant to the charge involving the Sears Roebuck store. A. That is correct.

Q. Would you please relate the conversation that you had with the defendant? A. I asked the defendant if he was the one who had been in the store and had taken the set on the previous day. The defendant denied taking the set. We talked again. I asked the defendant how come he was dressed as a Sears employee, had a Sears uniform on. I told him he was positively identified by a Sears employee and that the man didn't know him and just wouldn't pick him as somebody who was in the place and had taken the T. V. set. I also talked to him some more about where he got the shirt.

* * * * *

87 Q. Continue. A. We talked some more. After telling the defendant we had the eyewitness and that the man just wouldn't pick him out, the defendant admitted taking the T. V. set.

Q. Did you question him about the possible whereabouts of the television set? A. I did.

Q. Did he give you a location or address? A. He told me that the television might be found in the rear of 1909 Benning Road, Northeast.

Q. I see.

* * * * *

CROSS EXAMINATION

BY MR. DAVID:

Q. Officer Phillips, over what period of time would you say that you interrogated the defendant, the entire time from the time you first received him in custody at Sears until you took him to No. 1?

A. About 45 minutes.

Q. What time did you terminate your interrogation. A. About 1:30 or 1:35.

88 Q. It started at approximately 12 o'clock? A. No, sir. We booked the gentleman at 1 o'clock and I started to talk to him after 1 o'clock at the precinct.

Q. You had him in your custody before 1:00, did you not?

A. Yes, sir.

Q. Had you said not a word to him before 1 o'clock? A. No, sir.

Q. You had talked to him? A. I didn't talk to the defendant; I talked to the witness who had identified the defendant. I didn't interrogate him at the Sears store.

Q. You started your interrogation at the precinct, No. 8?

A. Yes, sir.

Q. That was approximately what time? A. That was approximately 1 o'clock, five after one.

Q. What time did you say you terminated your interrogation?

A. 1:30 or 1:35.

Q. What did you do with the defendant at that time? A. The defendant was sent down to Id. Bureau to get processed.

Q. Where is the Id. Bureau? A. At Headquarters.

89 * * * * *

Q. Do you have any recollection as to the number of times that you asked him whether or not he had taken the T. V. set? A. It might have been a few times through the interrogation.

Q. How many are a few times? A. Two, three or four times.

Q. Could it have been ten? A. I doubt it.

Q. Could it have been eight? A. I couldn't pinpoint it down, sir.

Q. Could it have been eight? A. No.

90 Q. Not over eight?

THE COURT: The witness said no to your first question about eight, Mr. David.

BY MR. DAVID:

Q. Could it have been seven times? A. It is possible.

* * * * *

Q. You stated the witness or the defendant told you the set might be down in the rear of 1909 Benning Road; is that correct? A. That is correct.

Q. Did you go there to look for the set? A. No, I did not.

Q. Did you send a fellow officer? A. Detective Holden went for the set.

Q. Did he find it? A. Yes, sir.

Q. Where is the set? A. The set is right there (indicating).

* * * * *

91 REDIRECT EXAMINATION

BY MR. MURPHY:

Q. I direct your attention to what has been marked Government's Exhibit 2 for identification. When did you first see Government's Exhibit 2 for identification? A. On the 4th, that was on a Monday.

Q. Where did you see it? A. At the precinct. Detective Holden had brought it in and I had opened the sealed carton.

Q. It was sealed at the time you first saw it? A. Yes, sir.

Q. Did you place any identifying marks on Government's Exhibit 2 for identification, which is the carton? A. No, sir -- the television, I did. I definitely remember marking the television set with my initials.

MR. MURPHY: With the Court's permission, may the witness examine Government's Exhibit 3 for identification?

THE COURT: He may.

92 BY MR. MURPHY:

Q. Sir, would you please examine Government's Exhibit 3 for identification. A. (Complied.)

Q. Directing your attention to Government's Exhibit 3 for identification, will you examine it, sir, to determine whether it bears your initials. Does it bear your initials? A. Yes, it does.

Q. In what portion of Government's Exhibit 3 for identification are your initials found? A. Right on the T.V. aerial that goes into the set.

Q. Where is that located, for purposes of the record? A. In the rear of the set.

Q. In what corner? A. Facing the set, on the right-hand corner.

Q. In the upper or lower position? A. In the upper position, sir.

Q. What initials are on there? A. "W.A.P."

Q. Does it bear any further marks? A. Yes, sir; it is in pen and it is difficult to read but it is my initials, and I put my initials again on the set. I marked it a second time after marking that because you couldn't read it.

93 Q. Did you place a date on there, Officer Phillips? A. Yes, sir.

Q. What was the date you placed on there? A. "9/4/61."

* * * * *

Q. Officer Phillips, what was the condition of the carton when you first saw it? A. The carton was closed and sealed.

Q. Is Government's Exhibit 2 for identification, the carton, the one you opened and found in it Government's Exhibit No. 3 and which you have marked with your initials? A. Yes, it was, sir, because I had the model number of the set and the box had the model number on it.

Q. Where were you and where was the box at the time you opened it and marked the set? A. In the detective room at No. 8 Precinct.

* * * * *

RECROSS EXAMINATION

BY MR.DAVID:

Q. Officer Phillips, I believe you testified heretofore that you were not present when the carton was found. A. No, sir, I was not.

* * * * *

94 HOWARD R. HOLDEN

called as a witness on behalf of the Government, having been first duly sworn, took the witness stand, was examined and testified as follows:

95 DIRECT EXAMINATION

BY MR. MURPHY:

* * * * *

Q. Did there come a time in which you received certain information about the taking of a television set from the Sears Roebuck store on Wisconsin Avenue? A. Yes.

Q. Now, pursuant to the information you received, did there come a time in which you went to 1909 Benning Road, Northeast? A. Yes.

Q. What is the nature of that premises? A. It is a shoe repair

96 shop.

Q. Did there come a time upon your arrival upon the premises that you conducted a search of the premises to determine whether you could find any property that had been listed to you as missing from the Sears Roebuck Wisconsin Avenue store? A. Yes, there did.

Q. Did you conduct an examination of the area? A. Yes.

Q. What, if anything, did your examination reveal? A. It revealed a television set in the parking lot in the rear of the store.

Q. Did you recover that object? A. Yes, sir.

Q. If you saw it again, would you be able to recognize it, sir? A. Yes.

Q. I direct your attention to what has been marked Government's Exhibit No. 2 for identification, a cardboard carton --

* * * * *

97 Q. * * *

Did you place any markings on that carton? A. No, I didn't.

Q. What day was it, sir, that you recovered what has been marked Government's Exhibit 2 for identification? A. That was on a Monday noon, on the 4th.

Q. What did you do with Government's Exhibit 2 for identification and its contents, Government's Exhibit 3 for identification, after you found them? A. We marked this. We subsequently opened the box up.

Q. At the time you found it, sir, what did you do with the two items? A. We transported it to No. 8 --

* * * * *

98 Q. After you arrived at No. 8 Precinct, where was Government's Exhibit 2 for identification and Government's Exhibit 3 for identification taken? A. To the second floor, the detectives' room.

Q. Was Detective Phillips there at that time? A. Yes, he arrived just shortly after that.

Q. Did he place any markings on Government's Exhibit 2 for identification in your presence? A. Yes, he did.

Q. Where abouts on Government's Exhibit 2, the carton, did he mark it? A. He marked it on the top.

Q. How did he mark it? A. He marked it with a pencil with his initials.

Q. What are his initials? A. Walter A. --

Q. His initials, sir. A. W.A.P.

Q. Does it bear a date? A. It does.

Q. Did there come a time in your presence when Detective Phillips marked Government's Exhibit 3 for identification? A. Yes.

Q. Where did he mark it? How did he mark it? A. He marked it

99 out here on the antenna wire -- near the antenna wire with an "X" mark and "W.A.P."

* * * * *

Q. Officer, directing your attention to Government's Exhibits 2 and 3 for identification, were they in your presence at all times from the time you recovered them from the rear of the premises of 1909 Benning Road, Northeast until such time as they were marked by Detective Phillips? A. They were.

Q. And they are the same objects that he marked? A. Yes.

* * * * *

CROSS EXAMINATION

BY MR. DAVID:

Q. Detective Holden, you say Government's Exhibit No. 2 was marked by Detective Phillips; is that right? A. That is right, sir.

Q. You stated that he marked the antenna in the rear of the set. A. Yes.

100 THE COURT: I believe that is Government's Exhibit No. 3, Mr. David.

MR. DAVID: I'm sorry, No. 3.

* * * * *

101 BY MR. DAVID:

Q. Would you please tell the Court why you did not mark it after you found it and brought it in? Why did you have someone else mark it? A. It was not -- It was actually possibly my responsibility to mark that but the object was taken for identification to No. 8 so that the complainant could identify it as their set, and then it was marked as a Government exhibit in evidence.

Q. Why did you not put your initials on it when you were the one who found it? A. Because it hadn't been identified by the complainant, the Sears Roebuck Company.

Q. After it had been identified by the Sears Roebuck Company, why did you not put your identification on it since you found it? A. That is a question I cannot answer.

* * * * *

106 Washington, D.C.
Wednesday,
February 14, 1962

* * * * *

109 MR. MURPHY: The Government moves at this time the receipt in evidence what has been marked Government's Exhibit 3 for identification, the television set.

* * * * *

MR. DAVID: If it please the Court, I object most strenuously to the admission of No. 3. I would also object to the admission of No. 2.

110 THE COURT: No. 2 has not been offered.

MR. DAVID: There is no testimony showing that No. 3 was the set that was in this box. There is no tying up of the set with this box. I have to allude to the box because they say this set was in this box. Now the Government wants to admit this into evidence. There is absolutely no testimony showing that this set was in this box. No one has testified that this defendant carried this set out of the Sears Roebuck store.

THE COURT: The objection will be overruled. Government's Exhibit No. 3 will be admitted in evidence.

(Government's Exhibit No. 3 for identification was received into evidence.)

* * * * *

131 CLOSING ARGUMENT ON BEHALF OF THE GOVERNMENT
BY MR. MURPHY

* * * * *

132 The Government would also bring to your attention the fact that the defendant failed to take the stand. No inference at all is to be given to you by the fact that he exercised this right. This is a very important right to the individual; it is an important right in our system of justice.

It is my job to prove to you --

MR. DAVID: Excuse me, please, Mr. Murphy.

May we approach the Bench, Your Honor?

133 THE COURT: You may.

(AT THE BENCH:)

MR. DAVID: May it please the Court, I may be wrong about this but I don't feel that the Government is in proper area in commenting on the defendant's failure to take the stand.

THE COURT: Will you read Mr. Murphy's statement to me, Madam Reporter.

(The record was read by the reporter.)

THE COURT: I don't think it is very wise to say that, Mr. Murphy. The Court in its charge to the jury will point out that no inference of guilt whatsoever arises from the defendant's failure to take the stand.

I do think it is better in these situations to refrain from such comment. It might sound as though you are, by inference, putting some suggestion or connotation on this fact. I recognize that that is not your intention. I would never mention this in the trial of a criminal case.

MR. MURPHY: Yes, Your Honor. I am sorry.

MR. DAVID: If the Court please, at this time I move for a mistrial on the grounds of counsel's statement in his argument on the failure of the defendant to take the stand.

THE COURT: Upon the basis of the phraseology?

134 MR. DAVID: Yes, Your Honor.

THE COURT: I believe I must deny your motion.

* * * * *

142 CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury, it is now the Court's responsibility to instruct you as to the law that will govern you in reaching your verdict in this case and it is, of course, your responsibility to accept the law as it is outlined to you by the Court.

Remember when you talk about the facts and the evidence in this case in the jury room that the closing arguments of the attorneys do not

143 constitute evidence. These closing arguments are efforts on the part of each attorney to present the evidence that is most favorable to the client that he represents in a light that will convince you of his viewpoint. The closing arguments of the attorneys are not evidence.

The questions asked by the attorneys are not the fundamental evidence in the case. Remember always that the evidence is the answer that the witness gives to the question. We observe sometimes in the trial of these cases that an attorney will ask a particularly clever and especially subtle question. I see the jurors smile when the question is asked. Of course, the evidence is the answer that the witness gives to that question. Remember, then, that the evidence comes from the lips of the witnesses in the case.

You will take with you into the jury room a copy of the indictment which has been returned by the Grand Jury in this case. The indictment is always a formidable looking document. No matter how familiar you become with them, they still impress you when you read them.

The important fact for you to remember in connection with this indictment is that the indictment is not evidence. The indictment is not proof of any fact whatsoever. The sole purpose of the indictment is to inform the defendant of the charges which have been preferred against

144 him; the charges which he and his attorney must answer when they come into open court. Remember, then, that this indictment is not entitled to any probative value in your deliberations.

This indictment is drawn in two counts. It charges, in the first count, the crime of housebreaking. In the second count, it charges the crime of grand larceny.

The first count of the indictment, in charging the offense of housebreaking, alleges that "On or about September 1, 1961, within the District of Columbia, Benjamin E. White" -- that is this defendant seated at counsel table -- "entered the store of Sears Roebuck and Company, a body corporate, with intent to steal the property of another."

The second count of the indictment, again referring to the date of September 1st, 1961, charges that "within the District of Columbia, Benjamin E. White stole the property of Sears Roebuck and Company, a body corporate, of the value of about $110 consisting of the following: one television set of the value of $110."

What is the crime of housebreaking? How is it defined in the District of Columbia Criminal Code?

The Criminal Code says that the crime of housebreaking consists of the following elements or factors: "Whoever shall, either in the night
145 or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, whether at the time occupied or not, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same" shall commit the crime of housebreaking.

The elements of the offense, then, are the entering either in the day or in the night, either by breaking or without breaking, into any dwelling, store, shop and so on, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the property. This constitutes the crime of housebreaking in the District of Columbia.

The crime of larceny, which is the crime that is charged in the second count, is divided into two categories or classifications. This defendant is charged with the crime of grand larceny. The word "grand" is used in the sense of the literal translation from the French work "grand" which means big or large.

The statute says, "Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward" shall commit the crime of grand larceny.

The word "feloniously" means unlawfully. The statute requires a
146 taking and a carrying away. The carrying away, however, is carrying away in the sense of the common-law crime of larceny. At the common-law of England from which we derive most of our law, the crime of larceny consisted of a taking and an asportation. The word "asportation" literally means to lift. And it was essential at the common-law that you do something more than place your hands on the property; there had to be an asportation, that is, a lifting in the sense of movement of the property in order to constitute the crime of larceny.

In the District of Columbia, our statute says there must be a taking and a carrying away. It is the law that any moving of an object is sufficient for the crime of grand larceny.

There is a principle of law in this jurisdiction that a jury has the right to consider in any indictment any lesser offense which is included in the greater offense charged. This means that in this case, you have the right in your deliberations to find the defendant not guilty of grand larceny but guilty of petty larceny if you believe the evidence proves that crime beyond a reasonable doubt.

What is the crime of petty larceny? The crime of petty larceny is defined as being a felonious taking and carrying away of anything of the value of less than $100.

I will explain to you at the end of these instructions the different
147 verdicts that you may return in this case.

The defendant is presumed to be innocent. This means that the defendant is not required to prove his innocence. His innocence is presumed. His innocence is maintained until the Government proves his guilt to your satisfaction beyond a reasonable doubt.

The presumption of innocence is one of the outstanding characteristics of Anglo-American law. In most of the other countries of the world, especially the Asiatic and the African countries, when a person is accused of a crime, he is brought into court and he is required to prove his innocence. We do not, in the United States, follow this custom; we say every man is presumed to be innocent.

The burden of proof is upon the Government to prove him guilty beyond a reasonable doubt. This means, then, that unless the Government sustains this burden of proof and proves to your satisfaction beyond a reasonable doubt that this defendant committed each and every element of the offenses with which he is charged, then you, the jury, must find the defendant not guilty.

I said to you a moment ago that the burden of proof is upon the Government to prove the defendant guilty beyond a reasonable doubt,

but this does not mean beyond all doubt whatsoever. In other words, the
148 Government is required to prove the defendant guilty to a moral certainty but not to an absolute or a mathematical certainty.

A reasonable doubt, as the name readily suggests, is a doubt which is predicated upon reason; a doubt for which you can give a reason to yourselves.

In the final analysis, however, proof beyond a reasonable doubt means simply this: If after a fair and impartial comparison and consideration of all of the evidence in this case you can truthfully say to yourselves that you are not convinced of the defendant's guilt, then you have a reasonable doubt and your verdict should be not guilty. But, if after you make this fair and impartial comparison and consideration of all of the evidence in the case, you can truthfully say to yourselves that you have an abiding conviction of the defendant's guilt, such a conviction as you would be willing to act upon in the more important and weighty matters in the course of your own daily lives, then you have no reasonable doubt and your verdict should be guilty.

In determining whether the Government has established the charges against this defendant, you must consider and weigh the testimony of all of the witnesses who have appeared before you, the witnesses called by the Government and the witnesses called by the defendant.

149 You are the sole judges of the credibility of the witnesses. This means that you must determine which witnesses to believe and to what extent you will believe them.

In determining how much credence, how much credibility you will give to the testimony of each witness you have the right to consider the demeanor of the witness on the witness stand, his manner of testifying, whether the witness impresses you as having an accurate recollection of the facts about which he is testifying, whether the witness impresses you as having any favor or prejudice towards the Government or the defendant, whether the witness displays any interest in the outcome of the case. In addition, you have the right to draw from the experiences

of your past lives. Consider anything that you observe in each witness which will help you in determining whether the witness is in fact a truth-telling individual.

If you believe that any witness willfully testified falsely as to any material fact concerning which the witness could not possibly be mistaken, you are then at liberty, if you deem it desirable to do so, to disregard the entire testimony of that witness or any part of the testimony of that witness.

The Court in the course of this trial permitted the Government
150 attorney to ask certain questions from the witness Marvin Williams concerning prior convictions of crimes of petty larceny and a conviction for a narcotics violation. The District of Columbia Code provides that no person shall be incompetent to testify in either civil or criminal proceedings by reason of his having been convicted of a crime, but such fact may be offered in evidence to affect his credibility as a witness.

It was the rule in England for some 400 years that when a person had been convicted of a crime, he never again could be a witness in the trial of any case. Obviously, this rule resulted in many unfair situations because sometimes the only witness that might be available might be a person who had been convicted of a crime. Consequently, some fifty or so years ago, one of our American states passed a law which said that no person shall be incompetent to testify, but the fact that he has been convicted of a crime may be brought out for whatever effect it has upon his credibility as a witness. This was almost immediately hailed as a great step forward in the law, and all of our American states and the District of Columbia adopted similar statutes.

The significance, then, of this statute is that the criminal record admitted by the defendant Marvin Williams is offered solely for the
151 purpose of guiding you in determining his credibility as a witness. It is for you to determine what, if any, effect this criminal record has upon his credibility as a witness in the present case.

You are further instructed that no inference of guilt arises against the defendant because of his failure to testify as a witness in his own behalf. The procedure in this Court is that defendants are told, "You may or may not be a witness as you see fit in your own case." Obviously, it would be unfair to tell a defendant that he does not have to take the witness stand if the jury was permitted to draw any inference from his failure to take the stand. I instruct you, accordingly, that no inference of guilt arises against the defendant because of his failure to testify as a witness.

It is the duty of the Court to make known to you the law that will govern you in your deliberations. It is your duty as jurors to accept the law as it is outlined to you by the Court.

You are the sole, the exclusive judges of the facts. The Court cautions you not to permit your judgment, your intelligence of your reason to be swayed by prejudice, by sympathy or by ill will.

Your verdict should be reached in accordance with the solemn oath
152 you took that you would well and truly try this case and a true verdict render in accordance with the evidence and in accordance with the law as it is outlined to you by the Court.

Your verdict must be a unanimous one, which means that all twelve of you must concur in your verdict.

Upon the first count of the indictment, your verdict may be either guilty or not guilty. Upon the second count of the indictment, your verdict may be either guilty of grand larceny or guilty of petty larceny, or not guilty. In other words, you have two possible verdicts on the first count of the indictment and three possible verdicts on the second count of the indictment.

Will counsel approach the Bench.

(AT THE BENCH:)

THE COURT: Mr. Murphy, does the Government request any further charge?

MR. MURPHY: Your Honor, the defense raised the question of the voluntary nature of the confession which was decided out of the presence of the jury. The admission came in subsequent to that time without further going into that area by defense counsel. It does not appear there is sufficient evidence to the contrary. The jury does have the right to consider the voluntary nature of any admissions.

153 THE COURT: The Court has permitted the jury to hear evidence about the admission. I try to avoid any specific reference to any individual item in the Court's charge in order that I am not highlighting or emphasizing it. I think since Mr. David, in the presence of the jury, has not questioned the voluntary nature of the confession that it would be almost unfair for the Court to comment on it.

MR. MURPHY: I didn't mean to request it more than to bring it to Your Honor's attention.

THE COURT: Do you have any objection to the charge as given?

MR. MURPHY: No, Your Honor.

THE COURT: Mr. David, do you request any further charge?

MR. DAVID: None, Your Honor.

THE COURT: Do you have any objection to the charge as given?

MR. DAVID: No, Your Honor.

* * * * *

[Filed February 14, 1962]

[VERDICT]

On this 14th day of February, 1962, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon the said jury, after hearing further of the evidence and the instructions of the Court, and after alternate juror Phoebe E. Norton is discharged from further consideration in this case, retires to consider their verdict; and thereupon the said jury upon their oath say that the

defendant, Benjamin E. White, is guilty as indicted; whereupon each and every member of the jury is asked if that is his verdict, and each and every member thereof says that the defendant is guilty as indicted.

The case is referred to the Probation Officer of the Court, and the defendant is remanded to the District of Columbia Jail.

By direction of

Edward A. Tamm
Presiding Judge
Criminal Court #2

* * *

* * *

[Filed April 6, 1962]

JUDGMENT AND COMMITMENT

On this 6th day of April, 1962 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of VIOLATION OF TITLE 22, D.C. CODE, SECTIONS 1801, 2201, as charged in counts one and two, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) years to twelve (12) years on count one; Three (3) years to nine (9) years on count two; Said sentence by the counts of the indictment to run concurrently.

IT IS ADJUDGED that

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edward A. Tamm
United States District Judge

The Court recommends ~~commitment to~~ Defendant be treated for drug addiction.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17183

BENJAMIN E. WHITE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
TIM MURPHY,
ROBERT A. LEVETOWN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Does Rule 5 of the Federal Rules of Criminal Procedure require exclusion of appellant's incriminating statements where no "Mallory" objection was raised at trial, and where appellant was questioned by the police for approximately thirty minutes after his arrest on adequate probable cause?

2. Did the trial court abuse its discretion in refusing to grant a mistrial where the prosecutor stated to the jury that no inference should be drawn from the appellant's exercise of his right not to testify and the judge thereafter explained to the jury that this rule was founded upon considerations of fairness?

3. Did the trial court err in admitting into evidence government's exhibit no. 3 after the testimony of several witnesses identified the exhibit as the proceeds of the crime for which appellant was being tried?

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OTHER REFERENCE

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted on October 16, 1961 on charges of housebreaking and grand larceny. (J.A. 3). After a trial by jury, appellant was found guilty as indicted on February 14, 1962. (J.A. 38, 39). By judgment filed April 6, 1962, appellant was sentenced to imprisonment for a period of four to twelve years for housebreaking, and three to nine years for grand larceny, the sentences to run concurrently. (J.A. 39).

The evidence at trial showed that on September 1, 1961, the appellant entered the stock room of the Sears, Roebuck and Company store located at 4500 Wisconsin Avenue, N.W., Washington, D. C. (J.A. 4, 5). At the

time, he was wearing a uniform customarily worn by Sears' employees. (Tr. 9). Appellant exchanged greetings with a stock man, Franklin Simmons, then picked up a television set in a sealed carton and walked out. (J.A. 5, 6). Simmons attempted to follow appellant but lost sight of him. (J.A. 5). Simmons then notified the store detectives of what had transpired. (J.A. 5).

An inventory was conducted and a Silvertone T.V. set, model number 1124 was found to be missing. (J.A. 8-10).

The next day, Saturday, September 2, 1961, appellant again entered the store, dressed in a Sears shirt and green pants, the latter not being part of the authorized uniform. (J.A. 12). Simmons spotted him and began to walk towards him with two other stock men. (J.A. 6). When appellant saw the group approaching, he turned and walked quickly up the stairs. (J.A. 6).

Upstairs, appellant was stopped by a store detective who asked him where he got the Sears shirt. (J.A. 13). Appellant answered that he had found it. (J.A. 13). He was then asked to accompany the store detective to the security office. (J.A. 13). The time was approximately 12:15 P.M. (Tr. 55).

Simmons was called and he identified appellant as the man who had made off with the television set the preceding day. (J.A. 12, 14).

Number Eight Police Precinct was notified and Officer Phillips arrived on the scene at about 12:45 P.M. (J.A. 16). While waiting for the police to arrive, the security officer at Sears did not accuse the appellant of stealing the television set or question him with regard to that offense. (Tr. 59). The questions the store detective directed at appellant were concerned with his wearing of part of the Sears uniform. (Tr. 59).

After he arrived at the store, Detective Phillips questioned the Sears employees who were witnesses. He did not question appellant. (J.A. 24).

About 1:00 P.M., appellant was transported to the Eighth Precinct and booked on a charge of grand larceny. (J.A. 16-17). Immediately thereafter, appellant

was questioned by the police for the first time. The interview took place in the Detectives Room. (J.A. 16).

Appellant was questioned for approximately thirty minutes, from 1:00 P.M. to 1:30 P.M. (J.A. 24). After being confronted with the evidence against him, appellant confessed to the crime and told Officer Phillips that the set could be recovered in the rear of 1909 Benning Road, Northeast. (J.A. 23). While questioning appellant, Officer Phillips was preparing a statement of facts and a line-up sheet. (Tr. 75-77). During the interview, Officer Holden was present except when he slipped out to get information "off the book" which was necessary for the paper work being completed. (Tr. 82). At approximately 1:30, appellant was sent down to the I.D. Bureau for further processing. (J.A. 24).

Officer Holden went to the address specified by appellant and found the television set in its carton abandoned on a parking lot in back of the premises. (J.A. 27). The sealed carton was brought to the precinct where it was opened by Officer Phillips, who marked the television set with his initials. (J.A. 25).

At trial, it was pointed out that the carton bore a "transfer tag" upon which appeared the address of the Sears store in question. (J.A. 7). The television set itself was identified by several witnesses as a Silvertone, model no. 1124, the type found missing on the original inventory. (J.A. 7-11).

In summing up the case, counsel for the government informed the jury that only the testimony of witnesses, as distinguished from argument of counsel, was evidence (Tr. 132); he further cautioned them that only one of the three government exhibits, the one actually moved into evidence, was to be considered by them (Tr. 132); and then, in the same vein, he admonished them as follows:

> The Government would also bring to your attention the fact that the defendant failed to take the stand. No inference at all is to be given to you by the fact that he exercised this right. This is a very important

right to the individual; it is an important right in our system of justice. (J.A. 30).

* * * *

Thereupon, at the bench, the court stated to the prosecutor:

THE COURT: I don't think it is very wise to say that, Mr. Murphy. The Court in its charge to the jury will point out that no inference of guilt whatsoever arises from the defendant's failure to take the stand.

I do think it is better in these situations to refrain from such comment. It might sound as though you are, by inference, putting some suggestion or connotation on this fact. I recognize that that is not your intention. I would never mention this in the trial of a criminal case.

(J.A. 31)

* * * *

Counsel for the appellant then moved for a mistrial and the motion was denied. (J.A. 31).

In the course of his charge, the trial judge instructed the jury as follows:

You are further instructed that no inference of guilt arises against the defendant because of his failure to testify as a witness in his own behalf. The procedure in this Court is that defendants are told, "You may or may not be a witness as you see fit in your own case." Obviously, it would be unfair to tell a defendant that he does not have to take the witness stand if the jury was permitted to draw any inference from his failure to take the stand. I instruct you, accordingly, that no inference of guilt arises against the defendant because of his failure to testify as a witness.

(J.A. 37)

* * * *

Counsel for appellant expressed satisfaction with the charge and requested no further admonitions. (J.A. 38).

STATUTES AND RULE INVOLVED

Title 22, D. C. Code § 1801 provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment, or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, D. C. Code § 2201 provides:

> Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

Title 18 U.S.C. § 3481 provides:

> *Competency of accused.*—In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

Rule 5(a), Federal Rules of Criminal Procedure provides:

> (a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

SUMMARY OF ARGUMENT

I

The admissibility of appellant's confession was contested at trial on the sole ground of coercion. This cannot be construed as a "Mallory" objection. Since the District Judge had no opportunity to pass on the issue now raised under *Mallory* and related cases, the point was not preserved for appeal.

The record, moreover, discloses that appellant's confession was not obtained during a period of unnecessary delay in arraignment. Appellant was arrested on adequate probable cause by Sears, Roebuck and Company store detectives and was held by them thirty minutes until the police arrived. (12:15 to 12:45 P.M.) The police remained at the store fifteen minutes during which time they questioned the witnesses, but not the appellant. (12:45 to 1:00 P.M.) Appellant was then taken to the precinct where he was booked for grand larceny. Immediately thereafter, appellant was interviewed by the police for approximately thirty minutes, during which time he confessed when confronted with the persuasive evidence against him. (1:00 to 1:30 P.M.) After an arrest on adequate probable cause, the police are entitled to confront the accused with the evidence against him and give him an opportunity to comment on it or explain it away. The limited inquiry conducted here did no more; the examination did not extend into "grilling" or have as its purpose the extraction of a confession to justify the arrest. Furthermore, the police are entitled to a reasonable delay to complete necessary administrative procedures incident to "booking". No rule of law prohibits conversation with the accused during this period.

II

The prosecutor's correct statement of law to the jury, to wit: that the appellant's failure to take the stand does

not create any inference against him, was not a prejudicial comment. It is undisputed that the judge on his own motion could properly have made the very same comment; the remark was no more prejudicial coming from the prosecutor. Further, the court's instructions which explained to the jury that considerations of fairness underlie the rule were adequate to remove any prejudice, if in fact any ever existed. Finally, in the context of this case, where a combination of eyewitness testimony, a confession, recovery of the proceeds of crime and other incriminating circumstances clearly inculpated the defendant beyond all doubt, the comment of the prosecutor did not affect the outcome of the jury's deliberations and at worst constituted harmless error. Accordingly, the trial court did not err in denying the motion for a mistrial based on the prosecutor's remarks.

III

There was no error in admitting government's exhibit No. 3 into evidence where the testimony of several witnesses identified the exhibit as the proceeds of the crime for which appellant was on trial.

ARGUMENT

I

The Admissibility Of Appellant's Confession On Mallory Grounds Is Not Reviewable On This Appeal And, In Any Event, The Confession Was Not Obtained in Violation of Criminal Rule 5(a)

Appellant maintains that the trial court committed reversible error when it failed to exclude testimony as to appellant's oral confession on grounds that it had been obtained in the course of an unnecessary delay in arraignment. *Mallory* v. *United States*, 354 U.S. 449 (1957). This point is without merit for two reasons: first, because there was no objection at the trial on this

ground, and second, because the confession was not made during a period of "unnecessary delay" in violation of Rule 5(a), Federal Rules of Criminal Procedure.

The record reveals that no mention was made at trial of any unnecessary delay in arraignment. The admissibility of appellant's confession was contested solely on the alleged ground that the confession was the product of coercion. At page 17 of the Joint Appendix, the following colloquy appears:

> MR. DAVID: At this time I would move to suppress any statement that the police officer might have taken from the defendant.
> THE COURT: On what ground?
> MR. DAVID: On the ground it was taken under duress and not voluntarily made.

This cannot be construed as a "Mallory" objection. *Tatum* v. *United States*, D.C. Cir., No. 16637, decided September 6, 1962. Since the District Judge had no opportunity to pass on the issue now raised under *Mallory* and related cases, the point was not preserved for presentation on appeal. *Johnson* v. *United States*, 110 U.S. App. D.C. 187, 290 F.2d 378 (1961); *Washington* v. *United States*, 103 U.S. App. D.C. 396, 258 F.2d 696 (1958); *Blackshear* v. *United States*, 102 U.S. App. D.C. 289, 252 F.2d 853 (1958).

The record, moreover, establishes that appellant's confession was not obtained during a period of unnecessary delay in arraignment. The crucial time period for purposes of this inquiry is that between appellant's arrest by Sears, Roebuck & Company store detectives about 12:15 P.M. on Saturday, September 2, 1961, and approximately 1:30 P.M. the same afternoon when appellant completed his statements at the eighth police precinct. Nothing that he may have said thereafter was used against him at his trial. It is settled that "Detention after a confession plainly does not affect its admissibility." *Metoyer* v. *United States*, 102 U.S. App. D.C. 62, 65 n. 4, 250 F.2d 30, 33 n. 4 (1957). See also *Mitchell* v. *United States*, 322 U.S. 65 (1944); *Lockley* v. *United States*, 106 U.S.

App. D.C. 163, 270 F.2d 915 (1959); *Trilling* v. *United States*, 104 U.S. App. D.C. 159, 260 F.2d 677 (1958).

In *Goldsmith* v. *United States*, 107 U.S. App. D.C. 305, 314, 277 F.2d 335, 344 (1960), *cert. denied*, 364 U.S. 863, this Court set out the criteria to be applied where a violation of the rule in *Mallory* is alleged:

> "when a plea of unnecessary delay is before us, we must examine in detail all the circumstances surrounding it taking into consideration the manner in which interrogation was conducted, the length of time involved and particularly the purposes which the police had in conducting their inquiry, if the purposes can be discerned."

Applying these criteria, the circumstances in this record demonstrate that appellant's confession was not obtained during a period of unnecessary delay.[1]

The Length of Time Involved

At the outset it should be noted that although appellant was arrested by store detectives at 12:15, the representatives of the Metropolitan Police Department did not respond to the scene and assume custody of the appellant until 12:45. During the half hour that appellant was held by Sears while awaiting the police he was not questioned with regard to the taking of the television set (Tr. 59).

The police arrived and remained at the store 15 minutes questioning the witnesses; the appellant, however, was not questioned by the police at this time.[2] At one

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[1] Admittedly, among the circumstances which might be relevant are whether the accused was advised by the police of his right to remain silent, that anything said by him could be used against him, or that he had a right to counsel. It is now claimed as a fact that at no time was the accused so advised. Brief for Appellant, pp. 6, 8 and 11. These "facts" do not appear anywhere in the record. Their absence, moreover, illustrates the difficulty of entertaining an objection on appeal that was not presented below.

[2] Counsel for appellant, at page 10 of his brief contends that Detective Phillips did interrogate appellant while at Sears, Roebuck and Company. This is a misstatement of the record and is flatly repudiated by the testimony appearing at J.A. 24.

o'clock, appellant was transported to the police station and booked for grand larceny. Immediately after being charged, appellant was interviewed for the first time by the police. The questioning took place in the Detective Room at the police station and lasted for thirty or thirty-five minutes during which time appellant confessed.

Officer Phillips conducted the examination. As he talked with appellant, he was preparing a statement of facts on the case as well as a line-up sheet. (Tr. 75-77). Officer Holden was also present most of the time, although he left for a few minutes to get information "off the book" necessary to complete the arrest papers. (Tr. 82).

From the beginning, the Supreme Court has recognized that the police are entitled to a reasonable delay to complete necessary administrative procedures incident to arrest. *Mallory* v. *United States, supra*, 354 U.S. at 453. No rule of law prohibits police conversation with the accused during this period. And it is clear that a confession obtained during a period of necessary delay is admissible. *Lockley* v. *United States, supra.*

Police Purpose In Conducting the Inquiry

The mere fact that appellant was taken to the Detective Room to be interviewed about the crime is not determinative of whether the officers' purpose was the impermissible one of extracting a confession to support appellant's arrest and conviction, in disregard of *Mallory*. On the contrary, it appears that in this case, the police had sufficient evidence, including a positive identification of appellant by an eyewitness to the offense, to support not only the arrest but also an ultimate finding of guilt. As in *Trilling* v. *United States, supra*, and *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 259 F.2d 943 (1958), *cert. denied*, 359 U.S. 959, probable cause was complete before the interrogation began. Thus, it cannot be said that the appellant was arrested "on suspicion" *for the purpose of questioning*, which was the evil condemned in *Mallory*. He was arrested and booked for grand larceny, and thereafter was briefly interviewed in connection with the

charge already placed against him. It has been repeatedly held in this circuit that the police are entitled to conduct a limited inquiry of the accused after an arrest on sufficient probable cause. *Heideman* v. *United States, supra; Goldsmith* v. *United States, supra.*

The Manner In Which The Interrogation Was Conducted

There was no protracted examination of appellant or anything resembling "grilling." *Goldsmith, supra, Heideman, supra.* Certainly, there was nothing comparable to the unremitting interrogation present in *Mallory* itself. "At the outset, the police, assuming they have probable cause for arrest, are entitled to ask the arrested suspect what he knows about a crime" *Heideman* v. *United States, supra,* 104 U.S. App. D.C. at 130-131, 259 F.2d at 945-946. "Such questions as these the police may ask—indeed *should ask;* it is only when the questioning crosses into what can be termed 'grilling' or is continued beyond the brief period allowed, that the resulting confession may be held inadmissible." *Ibid.*

When questioned by the police, the appellant at first denied the crime. Detective Phillips testified:

> I asked the defendant if he was the one who had been in the store and had taken the set on the previous day. The defendant denied taking the set. We talked again. I asked the defendant how come he was dressed as a Sears employee, had a Sears uniform on. I told him he was positively identified by a Sears employee as somebody who was in the place and had taken the T.V. set.
>
> * * * *
>
> We talked some more. After telling the defendant we had the eyewitness and that the man just wouldn't pick him out, the defendant admitted taking the T.V. set. (J.A. 23)

The examination was conducted, therefore, by confronting the appellant with the evidence against him and requesting him to comment on it or to explain it away. This practice was specifically sanctioned in *Heideman* v. *United*

States, supra, 104 U.S. App. D.C. at 130-131, 259 F.2d at 945. Further, the very brazenness of appellant's forays into the Sears stockroom suggested that a non-criminal explanation of his acts was possible. An examination of the type conducted here, therefore, might have led to appellant's release despite the facts already known to the police. *Cf. Goldsmith* v. *United States, supra.*

The facts and circumstances of this case demonstrate that neither the spirit nor the letter of *Mallory* was violated. Accordingly, appellant's claim of error must fail.

II

The Trial Court Did Not Err In Denying Appellant's Motion For A Mistrial

In the court below, counsel for appellant moved for a mistrial on the ground that the prosecutor, during the course of his final argument to the jury, alluded to the failure of the defendant to take the stand. The motion was denied and its denial is cited as error.

The prosecutor had stated to the jury:

> "The government would also bring to your attention the fact that the defendant failed to take the stand. No inference at all is to be given to you by the fact that he exercised this right. This is a very important right to the individual; it is an important right in our system of justice."

The Fifth Amendment to the Constitution guarantees the privilege against self-incrimination. A federal statute, 18 U.S.C. 3481, provides that the failure of a defendant to testify shall not create any presumption against him. This statute and the Fifth Amendment have been interpreted to prohibit "comment" on the defendant's failure to take the stand. *Milton* v. *United States*, 71 U.S. App. D.C. 394, 110 F.2d 556 (1940); *Peden* v. *United States*, 96 U.S. App. D.C. 27, 28, 223 F.2d 319, 320 (1955). However, the prohibition against "comment" is restricted to *adverse or prejudicial comment*, and not every remark relating to the defendant's failure to testify necessarily

falls within this category. *Milton* v. *United States*, *supra*.

In the cases cited by appellant where convictions have been reversed because of remarks at trial, the remarks clearly implied that there was something sinister to be inferred from the defendant's silence. For instance, in *Wilson* v. *United States*, 149 U.S. 60, 13 S.Ct. 765 (1893), the prosecutor, in referring to the defendant's failure to testify, argued to the jury:

> "I want to say to you, that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime." 149 U.S. 60, 66.

The objectionable comments in *Ing* v. *United States*, (9th Cir.) 278 F.2d 362 (1960) are reproduced in the appeal of Ing's co-defendant, Smith. *Smith* v. *United States*, (9th Cir.) 268 F.2d 414 (1959). The prosecutor had argued to the jury:

> ". . . if [the defense] didn't feel that [the government's evidence] was reliable, why didn't they put on some evidence? Why didn't they put some evidence on?" 268 F.2d 414, 418 n. 1.

A colloquy then followed between court and counsel in which it was made abundantly clear to the jury that it was the failure of the defendants themselves to testify that was at issue.

In each of the above cases, the prejudice inherent in the prosecutor's remarks was plain and it was this dimension of the remarks which required the conviction be reversed. Similarly, in *Stewart* v. *United States*, 366 U.S. 1, 81 S.Ct. 941 (1961), where the Supreme Court held that a question posed by the prosecutor concerning the defendant's failure to testify at two prior trials was reversible error, the court went to great length to point out that within the factual context of that case, the question was prejudicial.

In determining whether the remarks of the prosecutor were prejudicial in the present instance, it is relevant to

note that the same prohibition against adverse comment applies at trial to judge and counsel alike. *Morrison* v. *United States*, (8th Cir.) 6 F.2d 809 (1925); *Grantello* v. *United States*, (8th Cir.) 3 F.2d 117 (1924). Yet it is settled in this jurisdiction that, even in the absence of a request by the defendant, the trial judge may properly inform the jury of the principles of law applicable when the defendant chooses not to testify. *Smith* v. *United States*, 72 U.S. App. D.C. 187, 112 F.2d 217 (1940), *cert. denied*, 311 U.S. 663. The prosecutor in the present instance did no more. His remarks are not challenged as incorrect statements of law. They are challenged merely because it was he who stated them.[3] Since the same prohibition against adverse comment applies to both court and counsel, and since it has already been held that an unsolicited statement of the kind considered here is proper when announced by the judge, it would be unreasonable to hold that the same statement is necessarily prejudicial when articulated by counsel.

There is no question that if the prosecutor's remarks were accompanied by gestures or intonations which had the effect of adversely influencing the jury, a mistrial should properly have been granted. However, only the trial court had an opportunity to observe these matters. For this reason, that court is invested with discretion with reference to the grant or denial of mistrials. The trial court's decision on this matter should not be disturbed on appeal on the basis of the cold record or bare speculation as to harm.

Assuming the prosecutor's comments in this case can be regarded as prejudicial in any degree, the court's subse-

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[3] Although it might be said that counsel exceeded his functions in reciting law to the jury, this standing by itself, is not prejudicial error. The decisions in this jurisdiction are consistent with the theory that it is only when counsel argues misleading or erroneous principles of law to the jury that prejudicial error occurs. Compare *Taylor* v. *United States*, 95 U.S. App. D.C. 373, 222 F.2d 398 (1955) and *Evans* v. *United States*, 98 U.S. App. D.C. 122, 232 F.2d 379 (1956).

quent instructions to the jury were sufficient to exorcise the evil. The court stated:

> "You are further instructed that no inference of guilt arises against the defendant because of his failure to testify as a witness in his own behalf. The procedure in this Court is that defendants are told, 'You may or may not be a witness as you see fit in your own case.' Obviously, it would be unfair to tell a defendant that he does not have to take the witness stand if the jury was permitted to draw any inference from his failure to take the stand. I instruct you, accordingly, that no inference of guilt arises against the defendant because of his failure to testify as a witness." (J.A. 37.)

These instructions were couched in plain, forceful laymen's terminology, stressing the element of fairness. If any statement by the court could cure the error, this statement cured it; and it is recognized that even a distinctly prejudicial comment concerning the defendant's failure to testify can be remedied by appropriate instruction. *United States* v. *DiCarlo*, (2nd Cir.) 64 F.2d 15, 18 (1933); *Cf. Milton* v. *United States, supra.*

The government does not dispute that the defendant's right to refrain from testifying as well as the constitutional privilege against self-incrimination merit vigilant protection by the courts. However, the administration of criminal justice is a practical matter, and harmless errors which do not affect substantial rights must be disregarded. Rule 52(a), *Federal Rules of Criminal Procedure.* The innocuous remarks of the prosecutor in this case, when coupled with the remedial instructions of the court, and viewed against the background of the overwhelming evidence of guilt adduced at trial, do not constitute an error which either impinged on this defendant's rights or affected the outcome of the jury's deliberations. Accordingly, the trial court committed no error in denying the motion for a mistrial.

III

The Court Did Not Err In Admitting Into Evidence The Government's Exhibit No. 3

At trial, the government produced a carton, exhibit No. 2, and a portable Silvertone television set, exhibit No. 3. The latter exhibit was moved into evidence over the objections of counsel.

It is now alleged that the court erred in admitting exhibit No. 3 because it was not sufficiently connected up with the accused.

Prior to the admission of this exhibit, the testimony of various witnesses at trial established the following facts: the appellant was observed to remove a carton containing a television set from the Sears stockroom (J.A. 5, 6); an inventory was thereafter taken and a Silvertone television set, model number 1124, was found to be missing from the premises (J.A. 10, 14); the appellant, after his arrest, confessed to the crime and told the police where the set could be recovered (J.A. 12, 25); the police went to the site indicated by appellant and found a Silvertone television set, model number 1124, in its carton, abandoned on a parking lot (J.A. 27); the carton carried the address of the Sears store in question (J.A. 7), and it was also marked with the model number of the set it contained, number 1124 (J.A. 9); the sealed carton was retrieved and brought to the precinct where it was opened (J.A. 25); the television set therein was then marked for identification (J.A. 25, 26). On the basis of this testimony the trial court admitted the set into evidence, not as an illustration of the type of television set that was stolen, but as the actual proceeds of crime.

The record supports the trial court.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
TIM MURPHY,
ROBERT A. LEVETOWN,
Assistant United States Attorneys.

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